

ARKANSAS COURT OF APPEALS  
NOT DESIGNATED FOR PUBLICATION  
ROBERT J. GLADWIN, JUDGE

DIVISION II

CA07-763

FEBRUARY 27, 2008

J.W.F.		APPEAL FROM THE GREENE COUNTY CIRCUIT COURT [NO. JV 2000-20]
	APPELLANT	
V.		HON. WILLIAM LEE FERGUS, JUDGE
STATE OF ARKANSAS		AFFIRMED and MOTION TO WITHDRAW GRANTED
	APPELLEE	

This is a no-merit appeal based upon appellant's conviction and commitment to the Division of Youth Services (DYS). After a bench trial in Greene County Circuit Court, appellant, J.W.F., was found guilty of the misdemeanors of indecent exposure and public sexual indecency. The trial court found that appellant was delinquent as defined by Ark. Code Ann. § 9-27-303(14) (Supp. 2003), and committed him to DHS. From that judgment, appellant filed a timely notice of appeal, and his attorney filed a motion to withdraw as counsel and a no-merit brief. We hold that an appeal would be wholly without merit. Accordingly, we affirm appellant's conviction and grant counsel's motion to withdraw.

Appellant was accused of exposing himself to another student in the classroom. The victim of the exposure testified that even though there were teachers present, appellant directed the exposure of his penis to her and did not allow anyone else to see it. He then wrote her a note asking if she wanted to see it again. The victim testified that the exposure happened several times over a period of a few months. The victim also testified that appellant would grab her “bottom” and her “boobs,” and that this was done on several occasions as well. At trial, testimony was elicited from appellant’s social worker who stated that the victim had reported the incidents to her. The social worker also testified that during class she had intercepted a note written by appellant that referred to the victim in a sexually explicit manner. Appellant testified that he did not expose himself or touch the victim. The victim’s mother testified that the victim sometimes had problems telling the truth but that she believed the victim when she reported the incidents.

The trial court denied appellant’s motion for directed verdict, overruled several objections, and found appellant guilty of both misdemeanors. Appellant was committed to DYS and ordered to follow the aftercare plans. This appeal followed. His attorney has filed a motion to withdraw as appellant’s counsel. The motion was accompanied by a no-merit brief, pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Ark. Sup. Ct. R. 4-3(j), wherein all rulings adverse to his client are abstracted and discussed. Appellant has filed no pro se points for reversal.

According to *Anders* and Rule 4-3(j), an attorney’s request to withdraw from appellate representation based upon a meritless appeal must be accompanied by a brief that contains a

list of all rulings adverse to his client that were made on any objection, motion, or request made by either party. *Eads v. State*, 74 Ark. App. 363, 47 S.W.3d 918 (2001). The argument section of the brief must contain an explanation of why each adverse ruling is not a meritorious ground for reversal. *Id.* This court is bound to perform a full examination of the proceedings as a whole to decide if an appeal would be wholly frivolous. *Campbell v. State*, 74 Ark. App. 277, 47 S.W.3d 915 (2001). If counsel fails to address all possible grounds for reversal, this court can deny the motion to withdraw and order rebriefing. *Sweeney v. State*, 69 Ark. App. 7, 9 S.W.3d 529 (2000).

Counsel discusses three objections and the sufficiency of the evidence as required under *Anders*. Appellant's counsel submits that the trial court's denial of appellant's motion for directed verdict was proper. On appeal, a motion for directed verdict is treated as a challenge to the sufficiency of the evidence. *Coggin v. State*, 356 Ark. 424, 156 S.W.3d 712 (2004). We view the evidence in the light most favorable to the State, consider only evidence that supports the verdict, and affirm if substantial evidence supports the conviction. *Id.* Substantial evidence is that which is of sufficient force and character that it will, with a reasonable certainty, compel a conclusion one way or the other, without resorting to speculation or conjecture. *Id.* At the close of the State's case, the defense made the following motion:

At this time, I'd move for directed verdict. I believe that the State has not proven beyond a preponderance of the evidence, a prima facie case, that J.W.F. committed the offenses as alleged, primarily, not one time was it expressly stated what he exposed when he allegedly exposed himself, and not one time...

The trial court replied, “That’s not true. She said his penis.” The prosecutor said, “Yes, she did, on the front end, Scott.” The trial court then denied the motion. After the defense called appellant and the mother of the victim to testify, the defense rested and began closing argument. During his closing argument, defense counsel argued insufficiency of the evidence, and concluded by stating, “I would ask the court to find that the State has not met beyond a reasonable doubt the allegations that he exposed himself as alleged in the complaint.” The trial court said, “I am not persuaded by the arguments, and I feel that he is guilty of this.”

The question of sufficiency of the evidence is not preserved for appeal because defense counsel did not renew his motion for directed verdict at the close of all evidence. Ark. R. Crim. P. 33.1(c). However, even if the issue had been preserved, there is sufficient evidence to sustain the conviction. The statutes of conviction state in pertinent part as follows:

Ark. Code Ann. § 5-14-112. Indecent exposure

(a) A person commits indecent exposure if, with the purpose to arouse or gratify a sexual desire of himself or herself or of any other person, the person exposes his or her sex organs:

- (1) In a public place or in public view; or
- (2) Under circumstances in which the person knows the conduct is likely to cause affront or alarm.

Ark. Code Ann. § 5-14-111. Public sexual indecency

(a) A person commits public sexual indecency if he or she engages in any of the following acts in a public place or public view:

- (1) An act of sexual intercourse;
- (2) An act of deviate sexual activity; or
- (3) An act of sexual contact.

The testimony of the victim is enough to support the convictions for both offenses.

*Luckey v. State*, 302 Ark. 116, 787 S.W.2d 244 (1990). She testified that appellant exposed

his penis to her in the classroom without anyone else seeing. He then wrote her a note asking if she wanted to see it again. She further testified that he would grab her “bottom” and then he would grab her “boobs” on several different occasions. The trial court is free to resolve questions of conflicting testimony and may choose to believe the State’s account of the facts rather than the defendant’s. *See Stewart v. State*, 338 Ark. 608, 999 S.W.2d 684 (1999). In reviewing the evidence in the light most favorable to the State, substantial evidence exists to support the convictions.

The first objection outlined by counsel related to the testimony of Amy Higgins, a social worker employed by the school. Ms. Higgins stated, “On January 26, before we got ready to leave for court, before I got ready to leave for court, [the victim] had spoken with Ms. Mosby, the therapist...” At that point, counsel objected to hearsay. The court overruled the objection, explaining that no hearsay was as yet given. The witness continued to testify and two more objections to hearsay were made by the defense and sustained by the court.

Hearsay is defined by Ark. R. Evid. 801(c) as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. An appellate court will not reverse a trial court’s ruling on a hearsay question unless the appellant can demonstrate an abuse of discretion. *Sera v. State*, 341 Ark. 415, 17 S.W.3d 61 (2000). Here, the witness testified that the victim had spoken with another person, but did not attempt to relate into evidence any portion of the conversation between the victim and Ms. Mosby. We hold that this testimony does not amount to hearsay under the definition.

The same witness testified that she saw appellant throw a note to the victim and that she took another note out of the mouth of a third person after it had been passed to the third person by appellant and that appellant admitted to writing the notes. Defense counsel stated, “I’ll have to object.” The trial court overruled the objection without further comment. Counsel now claims that the objection is not specific enough to determine whether he was objecting to the admission of one or both notes. Furthermore, the grounds upon which the objection was made were not recited by defense counsel. Under *Mock v. State*, 20 Ark. App. 72, 723 S.W.2d 844 (1987), an argument for reversal will not be considered in the absence of an appropriate objection in the trial court. Also, to be considered appropriate, an objection must state the specific ground of objection if the ground is not apparent from the context. *Id.* It is clear that defense counsel’s objection was not appropriate due to his failure to state the specific ground supporting the objection and the ground is not apparent from the context.

Finally, the defense counsel objected to the trial court’s questioning of Ms. Higgins. The trial court, after having established with the witness her education, licensing, and whether she counseled the victim, stated the following:

Do you feel that you’ve got the ability to understand her motivations for doing things and to make a determination as to whether you think she would make something like this up in order to get some kind of attention or do something or whether it would be embarrassing to her?

The witness answered that the victim was very embarrassed, and the trial judge began to clarify something else when defense counsel stated, “I’m going to have to object for the record, I mean, as far as the defense position is once the State, I mean, asking them, drawing

this out, I just have to object.” The trial court asked, “To what?” The defense counsel responded, “To your questioning, putting her on, examining her as far as the mental capacity or the ability of the truthfulness of this child, and trying to draw that out, I just, I’m sorry, but I just feel like I’m in a position where I have to object.” The trial court overruled the objection.

Counsel claims that the trial judge has the right to interrogate a witness. Arkansas Rule of Evidence 614(b) generally permits the trial court to interrogate witnesses, whether called by the court or by a party. Our supreme court has set forth the following as the “clearly established” rule governing the trial court’s examination of witnesses by a circuit judge in a jury trial:

The judge has the right, in a criminal prosecution, to interrogate the witnesses but he has no right to usurp the place of the state’s attorney, “and prescribe the order of introduction of the witnesses, and become active in their examination”; nor has he the right to assume the duties resting on the prisoner’s counsel in the general conduct of the defense. He may ask questions which the attorneys had the right to propound, and failed to ask, when the answers to the same may tend to prove the guilt or innocence of the accused. It would be a reproach to the laws of the state, if he was required to sit and see the guilty escape, or the innocent suffer through a failure of parties or their attorneys to ask a witness a necessary question.

*Jordan v. Guinn & Etheridge*, 253 Ark. 315, 318, 485 S.W.2d 715, 718 (1972) (quoting *Ratton v. Busby*, 230 Ark. 667, 326 S.W.2d 889 (1959)). The supreme court also stated, “In instances where this court has found impermissible examination of witnesses by a trial court, the judge has typically impugned the credibility of the witness at issue.” *Britt v. State*, 334 Ark. 142, 164, 974 S.W.2d 436, 447 (1998). Here, it cannot be argued that the trial court’s questions of the witness were intended to “impugn” the witness’s credibility or that the trial court

usurped the place of the State's attorney or defense attorney or that the trial court acted improperly in any manner during its examination of the witness.

Accordingly, we affirm appellant's conviction and grant counsel's motion to withdraw.

Affirmed and motion to withdraw granted.

ROBBINS and HEFFLEY, JJ., agree.